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MICHAEL RODAK, JR., CLE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No.

79 - 183

WHITE AUTOMOTIVE CORPORATION,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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GRANT F. SHIPLEY,

425 Lincoln Tower,

Fort Wayne, Indiana 46802,

*Counsel for Petitioner, White Auto-  
motive Corporation.*

WILLIAM P. FAGAN,

EDWARD L. MURPHY, JR.,

LIVINGSTON, DILDINE,

HAYNIE & YODER,

425 Lincoln Tower,

Fort Wayne, Indiana 46802,

*Of Counsel.*

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**IN THE****Supreme Court of the United States****OCTOBER TERM, 1978****No.****WHITE AUTOMOTIVE CORPORATION,***Petitioner,**vs.***NATIONAL LABOR RELATIONS BOARD,***Respondent.*


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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT.**

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Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on May 7, 1979.

**OPINIONS BELOW.**

The opinion of the Acting Regional Director of Region Twenty-Five of the National Labor Relations Board, dated August 26, 1977, overruling Petitioner's Objections to the Certification of Representative, an unpublished decision, is printed in Appendix A hereto; Petitioner's exceptions to this decision were overruled by the National Labor Relations Board without opinion; the Opinion of the National Labor Relations Board sustaining the subsequent bargaining order is printed in Appendix B hereto and is reported at 235 NLRB No. 155; the opinion of the United States Court of Appeals for the Seventh

Circuit enforcing the order of the National Labor Relations Board, an unpublished opinion, is printed in Appendix C hereto; the Order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's Petition for Rehearing, an unpublished order, is printed in Appendix D hereto; and the Judgment of the United States Court of Appeals for the Seventh Circuit, unpublished, is printed in Appendix E hereto.

#### **JURISDICTION.**

The judgment of the United States Court of Appeals was entered on May 7, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

#### **QUESTIONS PRESENTED.**

An election of exclusive bargaining representative pursuant to Section 9 of the National Labor Relations Act, 29 U.S.C. § 159, was conducted at Petitioner's Columbia City, Indiana plant on July 22, 1977, resulting in a 29-27 margin in favor of the Union with one challenged ballot. Petitioner objected to the election results, for reason that certain campaign materials promulgated by the Union were false, that Petitioner could not effectively respond to the Union's statements, and that the election outcome had presumptively been swayed by the Union's false campaign statements. The objections were overruled, and the Order of the National Labor Relations Board directing Petitioner to bargain with the Union was subsequently enforced by the Court of Appeals. The questions presented are:

1. Whether a Union may, in a campaign for election of exclusive bargaining representative pursuant to the National Labor Relations Act, make projections or predictions as to increases in wages and fringe benefits which will occur if the Union is elected, where it would be an unfair labor practice for an Employer to disseminate its own projections or predictions under the rule of *National*

*Labor Relations Board v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969).

2. Whether, in the course of a campaign for exclusive bargaining representative under the National Labor Relations Act, a Union handbill claiming that "U.S. Government Reports Show Having a Union Pays Off!", based upon wage comparisons, is to be held to a standard of truthfulness concerning the contents of the Government's data, where there was insufficient time for the Employer to obtain a copy of the Report prior to the election.

3. Whether the dissemination of a printed "Guarantee" by the Union, in the course of a campaign for election as exclusive bargaining representative under the National Labor Relations Act, stating that the Union could not fine members, which statement was false, should have been strictly scrutinized as to its effects on the election results, where the Union simultaneously forewarned the employees that a response by the Employer would be an "anti-Union 'trick'."

4. Whether an Employer makes out a *prima facie* case that results of an election for exclusive bargaining representative under the National Labor Relations Act were tainted, where the Employer shows that the Union made material misrepresentations concerning issues central to the election campaign, and where it is probable, according to empirical data that the Union's campaign has shifted sufficient employee votes to have changed the outcome of the election.

### **STATUTES INVOLVED.**

Relevant portions of the statutes involved, Sections 7, 8 and 9 of the National Labor Relations Act, 29 U. S. C. §§ 157, 158 and 159, are:

#### **29 U. S. C. § 157:**

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."

#### **29 U. S. C. § 158:**

"(a) It shall be an unfair labor practice for an employer—

\* \* \* \* \*

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

#### **29 U. S. C. § 159:**

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .

\* \* \* \* \*

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer of employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

### **STATEMENT OF THE CASE.**

This is an appeal brought in the United States Court of Appeals for the Seventh Circuit, seeking to deny enforcement to a final Order of the National Labor Relations Board directing Petitioner to bargain with the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Union), pursuant to Section 8 (a)(5) of the National Labor Relations Act, 29 U. S. C. § 158(a)(5). Petitioner White Automotive Corporation (Employer) filed objections to the certification of the Union, stating in part that the Union's campaign literature had contained various false or misleading statements, which Employer could not effectively rebut, that these misrepresentations vitiated the employees' free choice guaranteed to them by Section 7 of the National Labor Relations Act, 29 U. S. C. § 157, that the Union should not have been certified pursuant to Section 9(c)(1) of the National Labor Relations Act, 29 U. S. C. § 159(c)(1), and that Employer should therefore not be required to bargain with the Union. The objections were overruled by the National Labor Relations Board, which entered an order requiring Employer to bargain collectively with the Union. An appeal was timely taken to the United States Court of Appeals for the Seventh Circuit pursuant to 29 U. S. C. § 160(f), which granted enforcement to the Board's Order.

The Union's Petition for Election was filed just at the time that Employer was expanding its facilities in Columbia City, Indiana, increasing the number of unit employees to approximately 100. At the time of the election, there were still only 63 eligible voters; the election was conducted in the midst of this plant expansion. The results were quite close: 29 votes in favor of the Union, 27 against, with one challenged ballot.

It is the dissemination of two (2) printed documents by the Union exactly one (1) week prior to the election which forms the basis of Employer's objections.

The first document purported to outline the economic gains which unionization would confer. The document purported to show that "Organized Workers Gain More Benefits", based upon "a new report by the Bureau of Labor Statistics". The document sported a large headline stating that "U. S. Government Reports Show Having a Union Pays Off!". The body of the document then relates precise dollars-and-cents wage differentials, and asks the employees: "What have you been missing?" The document concludes:

*"This is positive proof that having the UAW as your union and the right to negotiate with your employer can and does make a B-I-G difference."*

Employer was unable to obtain a copy of the "Report" purportedly relied upon by the Union, prior to the election day. When the report was received, it turned out that (a) the wage differentials referred to were not before-and-after "gains" following unionization, but merely reflected existing differences in compensation; (b) the data base of the report included all non-office, non-farm private employees, which includes a relatively high pattern of unionization among the better-paid crafts and trades, and a pattern of non-unionization among the more poorly paid casual workers and laborers; (c) the report does not reflect the industry-specific wage comparisons pertaining to the unit which the UAW was seeking to represent; (d) the dollar differentials quoted by the Union as differences in "earnings" are the differences in "total compensation" including various fringe benefits, whereas the actual pay differential between union and non-union manufacturing establishments is approximately one-half of that claimed by the Union.

The second document, distributed the same day, is captioned a "Guarantee" and bears the seal of the United Auto Workers. This document was posted by the Union immediately after Employer had (truthfully) quoted a provision of the Union's Constitution authorizing the Union to seek automatic deductions for Union dues, initiation fees, and fines. The Union's

response was to post an impressive "Guarantee" stating, in part: "The UAW 'cannot' and 'does not' fine UAW members!"

The "Guarantee" was prefaced with the statement: "The favorite anti-union 'trick' of management is to make 'untrue' statements about initiation fees, assessments, fines and union dues. Here are the 'real facts!'"

Employer attempted to rebut the "Guarantee" by (truthfully) quoting the Union's Constitution, which specifically authorizes fines not to exceed \$100.00 for any conduct unbecoming a member of the Union. The Union had, however, already forewarned the employees about this "anti-union trick" on the part of management, and Employer could not effectively rebut the Union's false statements.

On appeal to the United States Court of Appeals for the Seventh Circuit, the Court sustained enforcement of the Board's bargaining order. The Court found that the use of the Government statistics created only an ambiguity. The Court also agreed that Employer could not lawfully rebut the Union's document by disseminating its own views of what wages would be if the Union won the election. Concerning the "Guarantee," the Court noted that since the Employer had posted a response to this "Guarantee," it had effectively rebutted any misrepresentation. The Court rejected Employer's argument that the Union's special position of knowledge as to the contents of its own Constitution makes any Employer response inherently ineffective, in that the Union's express forewarning against a management rebuttal presumptively made any response ineffectual. The Court also rejected Employer's argument that the cumulative effect of these various Union handbills, in the context of a close election result, should deserve stricter judicial scrutiny.

#### **REASONS FOR GRANTING THE WRIT.**

An election of exclusive bargaining representative under Section 9 of the National Labor Relations Act, 29 U.S.C.

§ 159, is intended to be an expression of the free will of the individual employees. 29 U. S. C. § 157. There is no explicit statutory provision authorizing a campaign preceding an election; nonetheless, it is customary for the National Labor Relations Board to allow a short period of time for campaigning by both the Union and the Employer following the determination that an election should be held. Material misrepresentations of fact disseminated during that crucial campaign period may taint the election results, where it may be inferred that the misrepresentations had a significant impact on the election outcome. Thus, the National Labor Relations Board has adopted a standard for review of misrepresentations occurring during the campaign:

"[A]n election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." *Hollywood Ceramics Co.*, 140 NLRB 221, 224 (1962); see also *General Knit of California, Inc.*, 239 NLRB No. 101, 1978-79 CCH NLRB ¶ 15,317, at 28,617 (1978).

The importance of the *Hollywood Ceramics* rule was recently reiterated by the Board in *General Knit of California, Inc.*, *supra*:

"We believe that the direction of a new election, where, under *Hollywood Ceramics*, the Board finds that a substantial and material misrepresentation of fact had a reasonable tendency to affect the results of the election, has been a significant factor in the Board's electoral success, since the parties, knowing the serious consequences of their acts, have been deterred from engaging in conduct which would tend to interfere improperly with a free election."

In addition to acting as a deterrent to deceitful campaign trickery, the existence of the *Hollywood Ceramics* standard has provided a means of redress for a party who doubts the validity of the election results because of preju-

dicial campaigning by the prevailing side. The parties' access to the Board for review further legitimizes the integrity of the electoral process. And, because of its deterrent effect, the *Hollywood Ceramics* standard has been well accepted by the courts and by the parties who have used our election procedure. Indeed, if anything, the courts in certain circumstances have applied *Hollywood Ceramics* more strictly than the Board has done." (Footnotes omitted) (1978-79 CCH NLRB at 28,618.)

1. At the heart of any representation election is the question whether the employees will reap financial benefits, should the Union be elected. Completely apart from the rule of *Hollywood Ceramics, supra*, the Employer may not, as part of the election campaign, disseminate projections or predictions regarding wage levels which may result if the Union is elected. The rule is stated in *National Labor Relations Board v. Gissel Packing Co., Inc.*, 395 U. S. 575, 618 (1969), that an Employer's predictions as to future wages and conditions of employment

"must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . ."

This case presents a major question of first impression: are a Union's predictions and projections as to post-election wage gains subject to the *Gissel* rule?

During the election campaign at Petitioner's plant, the Union disseminated a handbill purporting to show that, if the workers were organized, they would "gain more benefits", based upon "U. S. Government Reports" which were said to show that "having a union pays off!". Asking "What have you been missing?", the handbill quoted specific dollars-and-cents wage differentials as being "positive proof that having the UAW as your union and the right to negotiate with your employer *can and does make a B-I-G difference.*"

Under the rule of *Hollywood Ceramics*, Employer was entitled to respond to this handbill; yet under the *Gissel* rule, Employer could not make an effective response by disseminating its own

predictions or projections as to the benefits of unionization.

The one-sided application of the *Gissel* rule creates a one-sided election campaign: while the Union is free to predict that there will be major increases in wages if the Union is elected, the Employer must stand mute.

The economic self-interest of the employees is a central concern of any representation election. A rule which permits a Union to publish predictions and projections as to wage increases, while denying to the Employer the right to counter those projections, significantly alters the character of the election campaign. A rule which permits a Union to predict wage increases, while denying the Employer a right to respond in kind, necessarily abrogates the principle that the National Labor Relations Act neither favors nor disfavors unionization. See 29 U. S. C. § 157.

2. The Union handbill captioned "U. S. Government Reports Show Having A Union Pays Off!", quoted certain dollars-and-cents wage differentials, and concluded that "This is positive proof that having the UAW as your union and the right to negotiate with your employer *can and does* make a B-I-G difference." The wage differentials reported by this handbill stated:

"The Government found that workers with a union earn \$2.30 per hour *more* than a worker without a union."

The Bureau of Labor Statistics study from which these figures were drawn reflects a differential in "total compensation" of \$2.30 per hour, based on "all industries". This "total compensation" figure includes not only the weekly pay, but also the dollar values for fringe benefits. The actual pay differential, union versus non-union, for "all industries" is \$1.57. More significantly, in the manufacturing industries (which would include automotive workers), the differential in "pay for time worked" is only \$.96 per hour.

The Union handbill, stating that an organized worker earns \$2.30 per hour more than a non-organized worker, goes on to

separately compare the paid leave, pension plan, and insurance benefits as between organized and non-organized workers. These fringe benefits were, in the Government report, subsumed in the \$2.30 "compensation" differential; the Union handbill suggests that the fringe benefits are separate and supplemental to the \$2.30 "earnings" differential.

The Court of Appeals for the Seventh Circuit, in refusing to strictly scrutinize the probable impact of these misstatements as to wage differentials, failed to follow a line of decisions in other Circuits requiring a strict degree of truthfulness and precision in union representations concerning wages. Indicative of the reported decisions with which the Seventh Circuit's opinion in this case now conflicts, is *Contract Knitter, Inc. v. National Labor Relations Board*, 545 F. 2d 967, 971 (5th Cir. 1977):

"[T]he cases place a higher standard of precision on Union statements regarding wages, since wages 'are the stuff of life for Unions and members, the self-same subjects concerning which men organize and elect representatives. . . .' Thus, claims 'involving wages and benefits based upon unstated hypotheses constitute a *prima facie* misrepresentation.'"

See also *J. I. Case Co. v. National Labor Relations Board*, 555 F. 2d 202, 205 (8th Cir. 1977); *National Labor Relations Board v. Millard Metal Service Center, Inc.*, 472 F. 2d 647, 650 (1st Cir. 1973).

3. On the same day the Union posted its wage comparison, it distributed a "Guarantee", bearing the official seal of the UAW, falsely stating that "the UAW 'cannot' and 'does not' fine UAW members!" Employer attempted to rebut this by posting what it believed to be a provision of the UAW Constitution which specifically provides for fines. The Court of Appeals determined that Employer had an opportunity to make an effective reply to this misrepresentation; in so holding, the Court departed from a line of cases in other Circuits which recognize that an Employer cannot effectively reply to a Union statement

concerning its own contracts, since a Union's statements sound authoritative on this point.

"Assertions about union benefits must be held to a fairly close standard of accuracy since a union's statements about its own contracts sound authoritative. Employees are liable to accept them uncritically. *NLRB v. Winchell Processing Corp.*, 451 F. 2d 306, 308-09 (9th Cir., 1971); *Thiem Industries, Inc. v. NLRB*, 489 F. 2d 788, 792 (9th Cir. 1973)."

The Seventh Circuit failed to give any consideration whatsoever to the special problem of credibility inhering in an Employer's attempts to contradict a Union's representations concerning the content of its own Constitution. And when the Union misrepresents that it cannot fine members, the Union has touched upon an area of vital concern in Federal Labor Law. As Chief Judge Pell noted, in his dissenting opinion in *National Labor Relations Board v. Southern Health Corp.*, 514 F. 2d 1121, 1129-30 (7th Cir. 1975):

"The authority of Unions to fine members for crossing picket lines is not an insignificant issue but has been a controversial labor relations question recurring in recent years. The Supreme Court has deemed resolution of conflicting principles involved in the situation important enough in the past few years to grant certiorari in order to delineate the extent and scope of a Union's authority to discipline its members for what would otherwise be protected activity:

*NLRB v. Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967).

*Scofield v. NLRB*, 394 U. S. 423, 89 S. Ct. 1154, 22 L. Ed. 2d 385 (1969).

*NLRB v. Granite State Joint Board*, 409 U. S. 213, 93 S. Ct. 385, 34 L. Ed. 2d 422 (1972).

*NLRB v. Boeing Company*, 412 U. S. 67, 93 S. Ct. 1952, 36 L. Ed. 2d 752 (1973).

*Boosters Lodge No. 405 v. NLRB*, 412 U. S. 84, 93 S. Ct. 1961, 36 L. Ed. 2d 764 (1973).

*Electrical Workers (IBEW) v. NLRB*, 159 U. S. App. D. C. 272, 487 F. 2d 1143 (1973), aff'd. 417 U. S. 790, 94 S. Ct. 2737, 41 L. Ed. 2d 477 (1974)."

4. Within the past few years, empirical evidence has been adduced which suggests that the Union campaign generally produces a 5% switch-over in votes. *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1977-78 CCH NLRB ¶ 18,048, at 29,977 (1977). The same data suggest that the Employer's campaign does not cause any switch-over voting, *id.*, 1977-78 CCH NLRB at 29,982 n. 23, although the interpretation of the data is subject to disagreement, see *General Knit of California, Inc.*, 239 NLRB No. 101, 1978-79 CCH NLRB ¶ 15,317, at 28,619 (1978) (finding that 29% of the elections were determined by switch-over votes).

The 29-27 balloting in favor of the Union, with one (1) challenged vote, presents a margin of victory well within the 5% swing-over which can be directly traced to the Union's campaign. Yet the Seventh Circuit held that the standard of review of the Board's approval of the election should be characterized merely as whether or not there has been an abuse of discretion. It is suggested that, in light of the empirical data upon which the National Labor Relations Board itself has relied, if the results of an election are within the narrow range of probable switch-over effect, and where the Employer demonstrates that the campaign was tainted by material misrepresentations by the Union, then the burden of proof should shift to General Counsel to show that the Union's margin of victory was not obtained by virtue of the Union's misconduct.

**CONCLUSION.**

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

**GRANT F. SHIPLEY,**  
425 Lincoln Tower,  
Fort Wayne, Indiana 46802,  
*Counsel for Petitioner, White Automotive Corporation.*

WILLIAM P. FAGAN,  
EDWARD L. MURPHY, JR.,  
LIVINGSTON, DILDINE,  
HAYNIE & YODER,  
425 Lincoln Tower,  
Fort Wayne, Indiana 46802,  
*Of Counsel.*

**APPENDIX A.****UNITED STATES OF AMERICA****BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Region Twenty-Five

WHITE AUTOMOTIVE CORPORATION  
*Employer*  
and  
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)  
*Petitioner*

Case No. 25-RC-6640

**SUPPLEMENTAL DECISION, ORDER AND CERTIFICATION OF REPRESENTATIVE**

Pursuant to a petition filed on May 16, 1977 and a Decision and Direction of Election issued by the Regional Director, an election was conducted on July 22, 1977, among certain employees of the above named Employer to determine whether or not they desire to be represented by the Petitioner for the purposes of collective bargaining.<sup>1</sup> The tally of ballots served upon

1. The appropriate unit as set forth in the Decision and Direction of Election is as follows:

All production and maintenance employees at the Employer's Columbia City, Indiana, plant, but excluding all office clerical employees, guards, all quality control inspectors, and all truck-drivers and supervisors as defined in the Act.

the parties at the conclusion of the election shows the following results:

Approximate number of eligible voters .....	63
Void Ballots .....	3
Votes cast for the Petitioner .....	29
Votes cast against participating Labor Organizations .....	27
Valid votes counted .....	56
Challenged Ballots .....	1
Valid Votes Counted plus Challenged Ballots ..	57

The challenged ballot is not sufficient in number to affect the results of the election. On July 29, 1977 the Employer filed objections to the election.<sup>2</sup> Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, an investigation was conducted under the direction and supervision of the undersigned, who after considering the results thereof, reports thereon as follows:

#### The Objections

The Employer's Objections allege in relevant part as follows:

"1. At a meeting organized and conducted by Petitioner by and through its representative, James Honaker, on the evening of July 20, 1977, the Petitioner by and through its said representative promised to employees in attendance at the meeting that if the employees elected the Petitioner as their representative and if the employees then engaged in a strike against the Employer in an effort to enforce the demands of Petitioner, the Petitioner would pay to or for the benefit of the employees throughout the duration of the strike all premiums necessary to insure the continuation of coverage by the employees and their dependents of all health insurance benefits presently being provided by the Employer to its employees. Petitioner further promised the employees who were in attendance at the meeting that if

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2. All parties were requested to furnish and did furnish various evidence in support of their respective positions.

they would engage in a strike, the Petitioner would send a representative from Chicago to negotiate and deal with all of the employees' creditors to insure that no creditor would repossess any property of any of the employees because of nonpayment of installments due on indebtedness to creditors, thereby guaranteeing to take whatever steps were necessary, including payments to creditors on behalf of employees, to insure against loss of property because of nonpayment of debts. Petitioner knew that the matter of insurance benefits was a substantial issue with certain employees and its promises of these benefits were calculated to, and did have, a significant impact on the results of the election.

2. It is the standard written employment policy of the Employer not to employ any person under the age of eighteen years as a permanent employee. This policy is based upon the Employer's own independent concern for the safety of young employees as well as the fact that many of the jobs performed at the Employer's plant are hazardous occupations under the Fair Labor Standards Act which are prohibited by that Act from being performed by persons under the age of eighteen. On January 31, 1977, Mark Sievers applied for employment with the Employer and represented on his employment application a date of birth of February 21, 1958. Late in the afternoon of July 22, 1977, following the election, Employer first heard rumors that Mark Sievers was presently seventeen years of age. Employer is now in the process of conducting an investigation to determine the true age of Mark Sievers and on its best information and belief believes that Mark Sievers was born on February 21, 1960 and has at all times material been under the age permitted by the Fair Labor Standards Act. Petitioner's organizational effort at the Employer's plant commenced shortly following the employment of Mark Sievers. Mark Sievers served as the chief in-plant organizer for Petitioner in the solicitation of support for Petitioner and throughout his tenure of employment Mark Sievers has served as the chief spokesman for the Petitioner, organizing meetings, distributing literature and serving as Petitioner's election observer. The Employer respectfully submits that such apparent fraud perpetrated

on the Employer by the Petitioner's chief organizer and spokesman had an undeniable impact on the results of the election and demands this Board's fullest scrutiny and inquiry.

3. On July 15, 1977, Petitioner caused to be distributed to the employees a Bureau of Labor Statistics report result which represented that that report found that union employees received average hourly wages of \$2.30 in excess of the average hourly wages of non-union workers. Such report also described substantially greater fringe benefits for union employees in contrast to non-union employees. Employer was unable to obtain the report itself prior to the election but on its best information and belief based upon telephone conversations with personnel at the Bureau of Labor Statistics the differential in compensation between union and non-union employees reported by the survey was based upon all forms of compensation including all fringe benefits in contrast to actual hourly wage rates as reported by Petitioner and, if true, Petitioner's reporting of the government survey was deliberately calculated to distort and misrepresent the results thereof to the Petitioner's benefit.

4. On July 15, 1977, Petitioner caused to be distributed to the employees a "Guarantee!" which among other things guaranteed that "the UAW 'cannot' and 'does not' fine UAW members." Petitioner caused this Guarantee to be made to the employees because it knew that the potential costs and liabilities of belonging to Petitioner was a major issue with employees.

Petitioner knew that its misrepresentations of a matter within its own special knowledge could not be effectively rebutted by the Employer notwithstanding Employer's attempts to correct by furnishing employees portions of the Petitioner's constitution since Petitioner could easily dismiss the Employer's attempted rebuttal by telling employees that the Employer was misinterpreting Petitioner's constitutional provisions."

#### The Exhibits

Attached hereto as Exhibits 1 through 9 are copies of all the literature distributed by the Employer during the election campaign. Exhibits 10 through 16 are copies of all of the literature distributed by Petitioner during the campaign.

#### Objection 1

In support of Objection 1 the Employer proffered the testimony of a single witness who testified she had attended a Union meeting a few days prior to the election. At this meeting the Union's business agent allegedly stated, in response to an employee question about health insurance during a strike, that the Union would pay the insurance and the employees did not have to worry about it. The employee testified that the Union agent did not speak in specifics but only in the general terms mentioned above. The Employer offered only hearsay testimony in support of the other half of Objection 1 which involves an alleged promise by the Union business agent that in the event of a strike the Union would send in a representative from out of town to work out any financial problems a striker might have with his creditors. It is the Employer's position that the remarks attributed to the Union's agent are objectionable for two reasons. First, that they are an alleged misrepresentation. The Employer, however, offers no evidence to indicate that the remarks attributed to the Union were false statements of Union policy except that the Employer had never heard of any instances of the Union engaging in such activity in a strike situation. The Employer admits, however, that it is not aware of any strike situation where the Union did not carry out such a policy. Additionally, the Employer admits it has no evidence to indicate the Union did not intend to follow such a procedure should the employees in the instant case go on strike. Secondly, the Employer contends the remarks made by the Union agent were objectionable promises of benefit should the Union win the election.

Petitioner admits that its representative at the July 20, 1977 Union meeting with employees told employees that in the event of a strike the Union would pay the employee's insurance premiums and also, if necessary, would bring a representative into town to meet with the employees' creditors in an attempt to secure agreement that no foreclosure or repossession of property would occur because of non-payment. Petitioner contends that such practices are the standard policy of the Union.

Clearly the evidence proffered and adduced in respect to Objection 1 does not warrant the setting aside of the election. The mere lack of knowledge on the Employer's part concerning the Union's practices in strike situations does not belie the Union's contention regarding the truthful nature of their statements concerning Union benefits given to strikers. Also, there is nothing objectionable in making employees aware of a legitimate Union benefit available to striking employees. It is no more improper for the Union to point out strike benefits paid during a strike than for the Employer to point out detriments such as loss of wages. Neither is objectionable. Accordingly, Objection I will be overruled.

#### Objection 2

In support of Objection 2 the Employer offers evidence which indicates that employee Mark Sievers was an active Union adherent throughout the Union campaign. Specifically, the Employer's evidence indicates that Sievers distributed Union authorization cards and Union literature, announced Union meetings to employees, attended the pre-election hearing with the Union representative, and acted as the Union's observer at the election. The Employer admits that none of Siever's actions connected with the campaign were objectionable per se. However, the Employer contends that at the time he engaged in these acts Sievers was engaging in a fraud against the Employer which caused his otherwise unobjectionable acts to become grounds for setting aside the election. The Employer maintains

that when Sievers was hired on January 31, 1977, he falsified his application so as to indicate that he was eighteen years old, when, in fact, he was only sixteen. The Employer allegedly did not learn of this fact until after the election. The Employer contends that it maintains a written policy of hiring only persons eighteen years old or older, and also that for it to utilize an employee who is less than eighteen on the vast majority of its jobs is a violation of the Fair Labor Standards Act. It is the Employer's position that his fraud by Sievers was imputable to the Union because Sievers engaged in activity on its behalf and thus is grounds for setting aside the election. The Employer admits that it has no evidence to indicate that at anytime prior to the election did the Union authorize or ratify Sievers to speak on the Union's behalf or with its authority, and that with the exception of the time he spent acting as the Union's observer, the Union did not pay Sievers for any of the activities he performed in support of the Union. The Employer alleges that Sievers was placed in the plant by Petitioner but proffered no probative evidence to support its allegation during the investigation.

The Petitioner admits that Sievers engaged in actively in support of the Union but denies that Sievers was its agent. Both Sievers and the Petitioner disclaim that the Union had any part in his allegedly fraudulent application or even had any knowledge of any alleged falsification of application until after the election.

Clearly, the evidence proffered and adduced during the investigation does not establish Union agent status for Mark Sievers at any time prior to the election. Additionally, as admitted by the Employer, had Mark Sievers been eighteen at the time he was hired his conduct was in no way objectionable. Thus, the question is reduced to one of whether or not the fact that Sievers was both working for the Employer under a false pretense and supporting the Union while he was under eighteen is objectionable. In the opinion of the undersigned such an unauthorized misrepresentation of age is not cause for setting aside

the election. Initially, such an alleged fraud was not of the sort which would cause employees to vote for the Petitioner in the election. Nor was the fraud attributable to the Petitioner. Additionally, there is no standard in the Act which prohibits or makes objectionable or illegal the Union activity of any employee under a specific age.

Thus, assuming arguendo the Employer's contention regarding a connection between the Petitioner and Sievers' securement and/or continuance of employment under false pretense (either directly or flowing from an agency relationship) were true, the undersigned fails to perceive any possible effect on the electorate's choice in its balloting. Thus any question concerning Petitioner's campaigning on the issue of the discharge of an activist is not presented as Sievers was not discharged, or the recipient of any other adverse action, prior to the election. The Employer's argument that the Petitioner would have been, without Sievers' presence, unable to secure so an effective an employee advocate is unsupported by evidence, remote, and grossly speculative in nature.

Accordingly, Objection 2 will be overruled.

#### Objections 3 and 4

In Objection 3 the Employer contends that Exhibit 13 contains an objectionable misrepresentation. Specifically, the Employer maintains that in the Exhibit the Petitioner has misrepresented to employees that union workers receive an average hourly wage rate of \$2.30 more per hour than do non-union employees. The Employer takes the position that the accurate use of the figure is that unionized employees receive \$2.30 per hour more than non-unionized employees in total compensation i.e. wage or earnings including fringe benefits and that the difference is not so large when strictly hourly wage rates (exclusive of fringe benefits) are compared. It is the Employer's position that the manner in which the Petitioner used the figure

in Exhibit 13 fails to distinguish between hourly wage rates and total compensation and that it even encourages a misunderstanding of the use of the figure and thus is objectionable. The Employer admits that it obtained a copy of Exhibit 13 on July 15, 1977, and on July 18, 1977, it learned telephonically from the publisher of the figure precisely the basis for comparison. However, the Employer did not attempt to respond to the alleged misstatement because it felt it could not do so without a copy in hand of the report from which it came and such a copy did not reach the Employer until after the election even though requested on July 18.<sup>3</sup> The Employer admits that in meetings with employees prior to the election it discussed the subject of wage rates and fringe benefits. Contrary to the Employer, earnings in normal parlance may include fringe benefits and mere use of alternate meanings of words to that which the Employer would have selected is not objectionable *Hollywood Ceramics Co., Inc.*, 140 NLRB 221; *Ralston Purina Company*, 147 NLRB 506.

In Objection 4 the Employer makes reference to Exhibit 12 and contends that it contains misrepresentations worthy of setting aside the election. The single point in the Exhibit attacked by the Employer is the statement "THE UAW 'CAN-NOT' AND 'DOES NOT' FINE UAW MEMBERS." The Employer cites the Petitioner's constitution as belying this statement. The Employer admits that it gained knowledge of the alleged misrepresentation on July 15, 1977 and distributed Exhibit 9 in response to Exhibit 12 at meetings of employees held on July 20 and 21, 1977. However, the Employer maintains that it was unable to effectively respond to Exhibit 12 because it was concerned with an internal Union matter on which employees would be more likely to credit Petitioner's statements. The Union contends the statement is true as stated

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3. Attached hereto as Appendix A is a copy of the survey from which according to the Employer, the figures in Exhibit 13 were taken.

and that the International Union does not fine members but rather fines to members are only levied by local unions.

In considering Objection 4, it is noted that the Employer admits making response to the Union's alleged misrepresentations about Union fines. In similar circumstances the Board has declined to set aside the election. *Chem-Trol Chemical Co.*, 190 NLRB 302; *Hollywood Ceramics Co., Inc., supra*.

Additionally, in considering alleged misrepresentations in election campaigns, the Board has recently held that, except in rare cases not involved herein, it will no longer set aside election on the basis of misleading campaign statements. *Shopping Kart Food Market, Inc.*, 228 NLRB 190.

Accordingly, for all the reasons stated above, Objections 3 and 4 will be overruled.

#### Decision and Order<sup>4</sup>

For the reasons hereinabove set forth, it is hereby ordered that the Employer's Objections be overruled in their entirety.

#### Certification of Representative

IT IS HEREBY CERTIFIED that a majority of the valid ballots has been cast for International Union, United Automobile, Aerospace & Agriculture Implement Workers of America (UAW), and that pursuant to Section 9(a) of the National Labor Relations Act as amended, the said labor organization is the exclusive representative of all the employees in the unit

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4. Under the provisions of Sections 102.67 and 102.69 of the Board's Rules and Regulations a request for review of the Supplemental Decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by September 8, 1977.

found appropriate herein for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

Dated at Indianapolis, Indiana this 26th day of August, 1977.

/s/ GEORGE M. DICK  
George M. Dick  
Acting Regional Director  
National Labor Relations Board  
Region Twenty-five  
Room 232, Federal Office  
Building  
575 North Pennsylvania Street  
Indianapolis, Indiana 46204

**APPENDIX B.**

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

<p><b>WHITE AUTOMOTIVE CORPORATION</b>            and  <b>INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE &amp; AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)</b></p>	Case 25—CA— 9345—2
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**DECISION AND ORDER**

Upon a charge filed on November 18, 1977, by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), herein called the Union, and duly served on White Automotive Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 25, issued a complaint on November 29, 1977, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 26, 1977, following a Board election in Case 25—RC—6640, the Union was duly certified as the exclusive collective-bargaining representative of Respond-

ent's employees in the unit found appropriate;<sup>1</sup> and that, commencing on or about August 26, 1977, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 9, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Respondent admits that it meets the Board's jurisdictional standards and that on July 22, 1977, a majority of the employees in the unit found appropriate cast ballots to designate the Union as their exclusive collective-bargaining representative. It denies that the Union has been, at all times since July 22, 1977, and is now, the exclusive representative of all the employees in the appropriate unit for the purposes of collective bargaining, but admits that on August 26, 1977, the Acting Regional Director certified the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit. Respondent admits the allegation that it refused, and continues to refuse, to meet and bargain with the Union as the collective-bargaining representative, but denies the conclusory 8(a)(5) and (1) allegations. Respondent alleges that the Acting Regional Director improperly certified the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit because the Acting Regional Director failed to uphold Respondent's meritorious objections.

On December 16, 1977, counsel for the General Counsel filed directly with the Board a motion to strike portions of

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1. Official notice is taken of the record in the representation proceeding, Case 25—RC—6640, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F. 2d 683 (C. A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F. 2d 26 (C. A. 5, 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D. C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F. 2d 91 (C. A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

Respondent's answer and a Motion for Summary Judgment.<sup>2</sup> Subsequently, on February 14, 1978, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

#### Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice To Show Cause, Respondent attacks the Union's certification on the basis of certain preelection conduct by the Union which Respondent alleges improperly influenced the results of the election.<sup>3</sup>

2. Subsequently, on February 6, 1978, counsel for the General Counsel submitted an amendment to the Motion for Summary Judgment, correcting the inadvertent omission of certain Appendices from its original Motion for Summary Judgment, and moved the Board to allow the amendment. We grant counsel for the General Counsel's motion to amend.

3. More particularly, Respondent alleges that certain union campaign materials contained material misrepresentations of fact warranting a new election. The alleged misrepresentations were: (1) a statement that, according to Bureau of Labor Statistics information, unionized workers receive an average wage rate of \$2.30 per hour more than nonunion workers, when in fact the differential reported was \$2.30 per hour in total compensation, including fringe benefits; and (2) a union statement that "the UAW 'Cannot' and 'Does Not' fine UAW Members," which Respondent rebutted by citing to its employees art. 31 of the Union's constitution, which authorizes such fines. The Acting Regional Director concluded that the foregoing statements did not constitute material misrepresentations sufficient to warrant a new election under *Hollywood Ceramics*,

(Footnote continued on next page.)

Review of the record herein reveals that in Case 25-RC-6640 the petition was filed by the Union on May 16, 1977. On June 22, 1977, the Regional Director issued his Decision and Direction of Election, and the election was conducted on July 22, 1977. On July 29, 1977, Respondent filed timely objections to the election, which the Acting Regional Director overruled in their entirety on August 26, 1977. Respondent filed its request for review of the Acting Regional Director's Supplemental Decision, Order, and Certification of Representative on September 8, 1977, which was denied by the Board on September 22, 1977, as it raised no substantial issue warranting review.

Following a request by the Union on or about September 1, 1977, that Respondent bargain collectively in good faith with respect to rates of pay, hours, and other terms and conditions of employment, Respondent refused to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the certified unit.

In response to a Motion for Summary Judgment, an adverse party may not rest upon denial in its pleadings, but must present specific facts at issue which require a hearing.<sup>4</sup> Respondent in the instant case presented no material facts not admitted or previously determined.

(Footnote continued from preceding page.)

140 NLRB 221 (1962), and that, in any event, the Board in *Shopping Kart Food Market, Inc.*, 228 NLRB No. 190 (1977), decided it would no longer set aside elections on the basis of alleged misrepresentations, except in rare cases. As noted elsewhere, on September 22, 1977, the Board denied Respondent's request for review of the Acting Regional Director's conclusion. We note that under either the *Hollywood Ceramics* or the *Shopping Kart* rationale the alleged misrepresentations presented herein clearly do not warrant setting aside the election.

Respondent raises two other defenses in its answer which were also raised as objections to the election. We find these other defenses to be untimely because they were decided adversely to Respondent by the Acting Regional Director, and Respondent failed to preserve them by including them in its request for review. See Sec. 102.67(f) of the Board's Rules and Regulations, Series 8, as amended.

4. *Western Electric Company, Hawthorne Works*, 198 NLRB 623 (1972).

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a) (5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>5</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence,<sup>6</sup> nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.<sup>7</sup>

On the basis of the entire record, the Board makes the following:

#### Findings of Fact

##### I. The Business of Respondent

Respondent is a Colorado corporation engaged in the manufacture, sale, and distribution of automobile tops, roll bars, tire carriers, automotive products, and related products. During the past 12 months, which period is representative of all times material herein, Respondent shipped directly to points outside the State of Indiana goods valued in excess of \$50,000. During the same 12 months, Respondent purchased goods valued in

5. See *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

6. Respondent's allegation that it has newly discovered evidence is without merit, inasmuch as the allegedly "newly discovered" evidence was presented to the Acting Regional Director in support of Respondent's objections to the election, and was presented to the Board in support of Respondent's request for review.

7. We deny the General Counsel's motion to strike portions of Respondent's answer.

excess of \$50,000, which were shipped directly to it from points located outside the State of Indiana.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

#### II. The Labor Organization Involved

International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), is a labor organization within the meaning of Section 2(5) of the Act.

#### III. The Unfair Labor Practices

##### A. The Representation Proceeding

###### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All production and maintenance employees at the Employer's Columbia City, Indiana, plant, but excluding all office clerical employees, guards, all quality control inspectors, and all truckdrivers and supervisors as defined in the Act.

###### 2. The certification

On July 22, 1977, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 25, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on August 26, 1977, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

**B. The Request to Bargain and Respondent's Refusal**

Commencing on or about September 1, 1977, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 1, 1977, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since September 1, 1977, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

**IV. The Effect of the Unfair Labor Practices Upon Commerce**

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

**V. The Remedy**

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent

for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F. 2d 600 (C. A. 5, 1964), cert. denied 379 U. S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F. 2d 57 (C. A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

**Conclusions of Law**

1. White Automotive Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), is a labor organization within the meaning of Section 2(5) of the Act.
3. All production and maintenance employees at the Employer's Columbia City, Indiana, plant, but excluding all office clerical employees, guards, all quality control inspectors, and all truckdrivers and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since August 26, 1977, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about September 1, 1977, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, White Automotive Corporation, Columbia City, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees at the Employer's Columbia City, Indiana, plant, but excluding all office clerical employees, guards, all quality control inspectors, and all truckdrivers and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in

the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Columbia City, Indiana, place of business copies of the attached notice marked "Appendix."<sup>8</sup> Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. April 25, 1978.

\*

John H. Fanning, *Chairman*

Howard Jenkins, Jr., *Member*

Betty Southard Murphy, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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8. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

**APPENDIX C.**

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted January 4, 1979

March 20, 1979

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. ROBERT A. SPRECHER, *Circuit Judge*

HON. WILLIAM J. BAUER, *Circuit Judge*

WHITE AUTOMOTIVE CORPORATION,  
*Petitioner,*  
vs.  
No. 78-1680  
NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

} On Petition for Review  
and Cross-Application for Enforcement  
of an Order of the  
National Labor Relations Board.

**ORDER**

The National Labor Relations Board held White Automotive Corporation (White) in violation of the National Labor Relations Act for refusing to bargain collectively with the Union<sup>1</sup> which had been certified as the exclusive bargaining agent of some of its production and maintenance employees. White petitions for review of the Board's bargaining order, asserting that the Union should not have been certified because of two alleged

1. The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW).

misrepresentations during the course of the campaign.<sup>2</sup> The Board cross-appeals for enforcement of its order. We have decided that it should be enforced.

On May 16, 1977, the Union petitioned the Board for a representation election, seeking certification as the exclusive bargaining representative of the production and maintenance workers at White's plant in Columbia, Indiana. At a June 3 representation hearing, the parties stipulated as to the appropriate unit (Tr. 8-10) but White sought to have the election postponed until late August. In support of this position, White represented that much of the production work would be transferred to a new facility adjoining the old plant in early July 1977. The ensuing changes would include a substantial increase in the size of the unit as well as some additional and different job classifications. White also asserted at the hearing that the disruption entailed by the move would interfere with an orderly and informative election campaign. On June 22, the Regional Director ruled on the basis of the hearing and post-hearing briefs that White's objections were insufficient to postpone the election,<sup>3</sup> which he then set for July 22. White did not seek review of that election date.

The election resulted in 29 votes for the Union, 27 votes against it, and one challenged ballot.<sup>4</sup> White filed objections to the conduct of the election, including the two alleged misrepresentations involved in this appeal. After an investigation, the Acting Regional Director on August 26 overruled the objections

2. There is generally no right of judicial review from Board certification of a union. A defense to an unfair labor charge based on an employer's refusal to recognize or bargain with a certified union is the usual means of securing judicial review of the certification decision. *Peerless of America, Inc. v. National Labor Relations Board*, 576 F. 2d 119, 121 (7th Cir. 1978).

3. The Union asserts, and White does not dispute, that it is standard procedure for the Board to hold an election within 30 days after the decision to grant an election petition (Br. 15, n. 9).

4. The total number of eligible voters was 63, and there were three void ballots.

and certified the Union since the challenged ballot could not affect the outcome of the election. White sought review of the certification, again asserting the misrepresentations relied upon here. The Board denied review on September 22 on the ground that the petition raised no substantial issues warranting review.

Thereafter White concededly refused to bargain with the Union. On November 18, the Union complained to the Board that White's refusal to bargain constituted an unfair labor practice in violation of Section 8(a)(1) and (5) of the Act (29 U.S.C. § 8(a)(1) and (5)). White answered, asserting that the Union should not have been certified as the exclusive bargaining representative because the conduct previously objected to had affected the results of the election. The Board granted summary judgment for the Union on the unfair labor practice charge on April 25, 1978, on the ground that all of the issues raised by White were or could have been raised in the representation hearing. The Board ordered White to cease and desist from engaging in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act and ordered it affirmatively to bargain collectively with the Union and to post appropriate notices. It is this order that White asks us to set aside on review.

The standard for review of a Labor Board determination of whether an election should be set aside has often been characterized as abuse of discretion. *Peerless of America, Inc. v. National Labor Relations Board*, 576 F.2d 119, 122 (7th Cir. 1978); *National Labor Relations Board v. Southern Health Corporation*, 514 F.2d 1121, 1124 (7th Cir. 1975). While this Court will not rubber-stamp the Board's conclusions (*Peerless of America, supra*, at 124), we have recognized that the task of evaluating campaign conduct is peculiarly within the Board's administrative domain. *National Labor Relations Board v. Southern Health Corporation, supra*, at 1123. The Board has recently vacillated in the standard it applies to judge alleged campaign misconduct. For many years, the test was that set out in *Hollywood Ceramics*, 140 NLRB 221, 224 (1962). This test

focused on whether there had been a substantial misrepresentation. Applying the test established in *Hollywood Ceramics*,

"an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth; at a time which prevents the other party or parties from making an effective reply \* \* \*."

In 1977, however, a divided Board rejected the *Hollywood Ceramics* test and decided elections should not be set aside on account of campaign misrepresentations except in rare circumstances. Such circumstances were described as improper use of Board processes or the use of forged documents which cause the employees to be unable to recognize them for what they are. *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1313-1314 (1977). Still more recently, the majority of the Board, over two lengthy dissents, overruled *Shopping Kart* and reinstated the *Hollywood Ceramics* standard. *General Knit of California, Inc.*, 239 NLRB No. 101 (1978). While the apparent difficulty the Board is experiencing in settling on a consistent standard for dealing with election misconduct could cast doubt on the presumptive validity of its decisions in individual cases, we are nevertheless convinced that the decision in the present case was correct.

Both the Acting Regional Director in his certification order and the Board in its bargaining order specifically held that the misconduct complained of was insufficient to justify setting aside the election under either the *Hollywood Ceramics* or the *Shopping Kart* tests.<sup>5</sup> We agree that this conduct fell short of any standard for which results of elections have been or should be set aside.

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5. The Board considered all the allegations presented by White in this appeal at the time White appealed the certification decision. On the basis of that prior decision the Board granted summary judgment for the Union on the unfair labor practice charge, commenting specifically that the two alleged misrepresentations were insufficient to warrant a new election under the *Hollywood Ceramics* test (App. 22-23, n. 3).

*The "Guarantee"*

On July 15, one week before the election, the Union circulated a handbill entitled "Guarantee!", which asserted that the UAW makes no assessments and that it cannot and does not fine its members. White asserts that the UAW constitution does provide for assessing fines against members, and that the "Guarantee!" therefore was a material misrepresentation.

At meetings with the employees on July 20 and 21, White distributed its own handbill rebutting the "Guarantee!" by quoting from the sections of the Union's constitution that authorized fines and other disciplinary measures against members. White's handbill queried, "Why did the union lie to you??" In the representation proceeding before the Acting Regional Director, the parties differed on whether the Union's "Guarantee!" contained misrepresentations. The Union contended the handbill referred to the International Union which, it asserted, is not authorized to assess or fine members, although the Local Union may. This factual dispute was not resolved, since the Acting Regional Director concluded that White had effectively answered the offending circular so that under *Hollywood Ceramics* the election should not be set aside.

White argued on appeal to this Court that because the title "Guarantee!" was lettered in Old English script, and because the circular had an impressive border and bore the Union seal, it purported to be an official document and was understood as such by the employees. This appears to be a rather far-fetched attempt to suggest that the document was forged, which might bring it within one of the situations in which the Board had said in *Shopping Kart, supra*, that it would set aside an election. We find it hard to believe that any employees would understand the "Guarantee!" to be anything other than a campaign document in an eye-catching format. White also asserts that the "Guarantee!" constituted actionable fraud under Indiana law. Whether or not this is true is irrelevant to a consideration of whether the election should be set aside. We find both the forgery and the

fraud arguments unpersuasive in view of the fact that White had ample time to rebut the perceived misrepresentation and did in fact do so. Even assuming the "Guarantee" constituted a material misrepresentation, it is insufficient to justify setting aside the election since the last element of the *Hollywood Ceramics* test—lack of opportunity to make an effective reply—was not present.

Finally with respect to this handbill, White argues that the effectiveness of its reply was undermined in advance by the first paragraph of the "Guarantee!", which states "The favorite anti-union 'trick' of management is to make 'untrue' statements about initiation fees, assessments, fines and union dues. Here are the 'real facts!'" White appears to be suggesting that the first person to call the other a liar thereby insures his own credibility. That proposition is patently unsupportable and in any event does not help White since it first asserted in a June 29 letter that "a union doesn't even have to tell the truth in a campaign." The same letter introduced the issue of fines and assessments with the comment that if the Union wins "you are going to be supporting it with dues, fines and assessments for a long, long time." In a subsequent letter on July 13, White quoted from the section of the Union constitution authorizing dues and fines and emphasizing the financial costs of union membership (R. item 10, attached documents). Accordingly we cannot conclude that White's opportunity to rebut the alleged misrepresentation was so significantly impaired that the election should be set aside.

*The Wage Comparison*

White also objects to a second Union handbill distributed the same day as the "Guarantee!". This circular stated that a report by the Bureau of Labor Statistics (BLS) showed that union workers earn \$2.30 per hour more than workers without unions. It stated that the average hourly rate of compensation for unionized non-farm workers was \$5.83 an hour in 1972, compared to \$3.53 for similar, non-unionized workers. The handbill

went on to compare paid leave, pension plans and life insurance and health benefits for union as compared to non-union workers, in each case indicating that union workers fared considerably better. White argues that the handbill was intended to and did convey the impression that wages for union workers were \$2.30 per hour higher than wages for non-union workers, and that in addition the fringe benefits were also higher for union workers. In fact, the BLS report relied upon subsumed wages and fringe benefits in the total rate of compensation, which it found to be \$2.30 higher for union workers. The extra fringe benefits are therefore included in the \$2.30 figure, rather than being in addition to it.

White relies on *Peerless of America v. National Labor Relation Board, supra*, in which this Court recognized the importance of wage comparisons in an employee's decision on how to vote on unionization. *Peerless* held that a union's misrepresentation of wage comparisons between a purportedly similar plant in which it had negotiated the contract and the plant in which the election was held could fatally infect the election. The case was remanded to the Board for a determination of whether the misrepresentation was substantial enough to justify setting aside the result of the election.

*Peerless* did not hold that all misrepresentations of comparative wages necessitate invalidating the election. That is appropriate only where the misrepresentation is substantial and cannot, because of time or inability to identify the basis for the figures, be corrected by the other party. In this case, it is not clear there was a misrepresentation at all. As the Acting Regional Director noted in his certification decision, "[E]arnings in normal parlance may include fringe benefits \* \* \*" (App. 12). We cannot characterize the manner in which the Union described the BLS report as a misrepresentation, although it could be considered ambiguous.

In addition, White did have the opportunity to reply and to clarify the ambiguity. Unlike the situation in *Peerless, supra*,

the Union in this case clearly revealed the source of its information in the handbill itself. Three days after the handbill was circulated, White contacted the BLS to confirm the statistics contained in the handbill and learned that the \$2.30 figure included fringe benefits.<sup>6</sup> White made no attempt to explain this to the employees, contending that White felt it should have a copy of the BLS report to substantiate this version. The requested copy did not arrive until after the election. As the Board points out, however, White could have informed the employees of what it learned from the BLS and could have suggested that they could confirm the information by contacting BLS themselves.<sup>7</sup> We agree that this was a reasonable alternative, especially since it does not appear that the need for clarification arose from anything more than an ambiguity.<sup>8</sup> Thus the wage comparison did not amount to a substantial misrepresentation of fact and White was not precluded from making an effective reply, so that two of the elements established in *Hollywood Ceramics* as necessary to set aside an election are missing.

#### *Totality of the Circumstances*

White concludes its argument by asserting that even if the two alleged misrepresentations would normally be insufficient to

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6. There is no allegation that the BLS figures are themselves misleading or that the Union reported them incorrectly other than the ambiguity at issue.

7. White in its reply brief insists that it could not reply because it is prohibited by the rule in *National Labor Relations Board v. Gissel Packing Co., Inc.*, 395 U. S. 575, from making predictions of the consequences of unionization. We are not suggesting that White should have countered the handbill with its own predictions of what wages would be if the Union won, but only that it could quite easily have cleared up the ambiguity it perceived in the Union's circular.

8. White argues that the reference to the BLS report, an official U. S. Government publication, was an attempt to place the authority of the Government behind the campaign literature, or to suggest it had received official approval. On the contrary, the handbill was clearly campaign literature distributed by the Union, and the reference to the BLS report served to identify the source of the figures.

necessitate setting aside the election, they assume greater importance considered in the context of this particular election. The circumstances that purportedly aggravated the effect of the circulars are the growth of the unit soon after the election, the disrupting effect of the plant's move on the campaign, the importance of both issues raised by the offending handbills, and the closeness of the vote. The first two of these arguments go to the timing of the election. This issue was settled when, after a full hearing, the Regional Director ordered the election to be held July 22. As noted, White did not appeal from that decision. In addition, the record shows that White waged a vigorous campaign, distributing numerous anti-union articles and aggressively phrased letters, as well as holding several meetings.

It is true that this Court has recognized that wages are a central issue in a unionization decision (*Peerless of America, Inc., supra*) and that the closeness of an election will be taken into account in evaluating the probable impact of campaign misrepresentations. *Follett Corporation v. National Labor Relations Board*, 397 F. 2d 91, 95 n. 3 (7th Cir. 1968). While these are factors to be considered, they do not necessitate the conclusion that the election must be invalidated. *National Labor Relations Board v. Southern Health Corporation, supra*, at 1125. On the facts of this case, even considering these additional factors, we cannot say that the Board was wrong in its conclusion that the election results should stand.

The order appealed from will be enforced.

#### APPENDIX D.

##### UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 12, 1979.

##### Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. ROBERT A. SPRECHER, *Circuit Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

WHITE AUTOMOTIVE CORPORATION,  
Petitioner,  
No. 78-1680 vs.  
NATIONAL LABOR RELATIONS BOARD,  
Respondent.

} On Petition for Review  
and Cross-Application  
for Enforcement  
of an Order of the  
National Labor Re-  
lations Board.

##### ORDER

On consideration of the petition for rehearing filed in the above-entitled case by petitioner White Automotive Corporation, all of the judges on the original panel having voted to deny the same,

**IT IS HEREBY ORDERED** and that aforesaid petition for rehearing be, and the same is hereby, DENIED.

**APPENDIX E.**

UNITED STATES COURT OF APPEALS  
For the Seventh Circuit  
Filed May 7, 1979

WHITE AUTOMOTIVE CORPORATION,  
*Petitioner,*  
vs.  
NATIONAL LABOR RELATIONS BOARD,  
*Respondent.* } No. 78-1680

Before: CUMMINGS, SPRECHER and BAUER, *Circuit Judges.*

THIS CAUSE was submitted to this Court upon a petition filed by White Automotive Corporation, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns on April 25, 1978, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. From the study of the briefs and transcript of record and without oral argument, the Court, on March 20, 1979, being full advised in the premises, handed down its order granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Petitioner, White Automotive

Corporation, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

/s/ WALTER J. CUMMINGS

*Judge, United States Court of  
Appeals for the Seventh  
Circuit*

A True Copy:

Teste:

/s/ KATHLEEN M. ENGEL

*Deputy Clerk of the United States  
Court of Appeals for the  
Seventh Circuit.*

(SEAL)

SEP 25 1979

No. 79-183

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

WHITE AUTOMOTIVE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT

BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD  
IN OPPOSITION

WADE H. McCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

JOHN S. IRVING  
*General Counsel*

JOHN E. HIGGINS, JR.  
*Deputy General Counsel*

ROBERT E. ALLEN  
*Acting Associate General Counsel*

NORTON J. COME  
*Deputy Associate General Counsel*

LINDA SHER  
*Assistant General Counsel*

CANDACE M. CARROLL  
*Attorney*  
*National Labor Relations Board*  
*Washington, D.C. 20570*

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OCTOBER TERM, 1978

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No. 79-183

WHITE AUTOMOTIVE CORPORATION, PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
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THE SEVENTH CIRCUIT*

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BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD  
IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A22-A30) is not reported. The Board's decision and order (Pet. App. A12-A21) are reported at 235 N.L.R.B. No. 155. The Board's decision in the related representation proceeding (Pet. App. A1-A11) is not reported.

(1)

## JURISDICTION

The judgment of the court of appeals (Pet. App. A32-A33) was entered on May 7, 1979. The petition for a writ of certiorari was filed on August 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Board properly overruled petitioner's objections to the conduct of a representation election and directed petitioner to recognize and bargain with the union.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 4.

## STATEMENT

1. On July 22, 1977, the Board's Acting Regional Director conducted a representation election among petitioner's production and maintenance employees (Pet. App. A1). There were 29 votes cast for the union (the United Auto Workers), 27 against it, and there was one challenged ballot (Pet. App. A2). Petitioner filed timely objections to the election, contending that the union's campaign had improperly influenced the outcome (Pet. App. A2).

The Acting Regional Director conducted an investigation, during which all parties were allowed to sub-

mit evidence. Petitioner contended that a union handbill distributed a week before the election had misrepresented a report of the Bureau of Labor Statistics (BLS) by stating that the government found that workers with a union earn \$2.30 per hour more than a worker without a union (Pet. App. A4, A8-A9). According to petitioner, this sentence suggested that unionized workers earned \$2.30 more per hour in wages alone, when in fact the \$2.30 figure included fringe benefits (Pet. App. A8-A9). Petitioner also contended that it was unable to respond to this alleged misrepresentation because, although it learned by telephoning BLS four days before the election that the quoted figure included fringe benefits, it was unable to obtain a copy of the report until after the election (Pet. App. A9). The Acting Regional Director concluded that the union's statements were not misrepresentations, since "earnings in normal parlance may include fringe benefits, and mere use of alternate meanings of words to that which [petitioner] would have selected is not objectionable" (*ibid.*). The Director also concluded that petitioner could have responded to any ambiguity it perceived in the handbill, since it had learned how the \$2.30 figure had been calculated four days before the election, and admitted having held meetings with employees at which wages and fringe benefits were discussed (*ibid.*).

Petitioner further contended that a second union handbill headlined "Guarantee!" had falsely stated that "the UAW 'cannot' and 'does not' fine UAW

members," when in fact the union's constitution specifically empowers the union to fine its members (Pet. App. A4, A9).<sup>1</sup> Petitioner admitted that it had received a copy of this handbill on July 15, a week before the election, and had distributed its own leaflet in response. Petitioner's leaflet rebutted the union's statement by quoting the union's constitution, offering to show the constitution to employees, and asking, "Why did the union lie to you?" (Pet. App. A9, A26). Petitioner contended, however, that its response was ineffective because employees would not likely believe an employer's statements about the contents of the union's constitution. The Director rejected this argument (Pet. App. A9, A10).

The Acting Regional Director certified the union as the employees' bargaining agent (Pet. App. A1-A11). The Board denied petitioner's request for review of the Director's decision and certified the union (Pet. App. A15). Petitioner refused to bargain, and in the subsequent unfair labor practice proceeding the Board held that the refusal violated Section 8(a)(5) and (1) of the Act. The Board ordered petitioner to bargain with the union (Pet. App. A16-A21).

2. The court of appeals enforced the Board's order in an unpublished order (Pet. App. A22-A30). The court noted (Pet. App. A25) that, under

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<sup>1</sup> The union contended that the statement referred to the international union, which does not fine members, although the local union may. The Acting Regional Director found it unnecessary to resolve this dispute (Pet. App. A9-A10).

the test enunciated in *Hollywood Ceramics*, 140 N.L.R.B. 221, 224 (1962), only "a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party \* \* \* from making an effective reply" is grounds for setting aside a representation election. The court agreed with the Board that petitioner had not shown that the union's leaflets contained misrepresentations and that, in any event, petitioner had an opportunity, which it exercised, to make an effective reply (Pet. App. A26-A29).

Concerning the "Guarantee" the court stated, "[w]e find it hard to believe that any employees would understand the 'Guarantee!' to be anything other than a campaign document in an eye-catching format" (Pet. App. A26). Concerning the wage comparison, the court noted that there was "no allegation that the BLS figures are themselves misleading or that the Union reported them incorrectly" (Pet. App. A29 n.6), and concluded that "[w]e cannot characterize the manner in which the Union described the BLS report as a misrepresentation, although it could be considered ambiguous" (Pet. App. A28). The court further noted that petitioner had the opportunity "to clarify the ambiguity" (*ibid.*).

Finally, the court rejected petitioner's argument that factors such as the closeness of the vote and petitioner's planned move and expansion of its workforce required that the election be set aside. The court held that "[o]n the facts of this case, even

considering these additional factors, we cannot say that the Board was wrong in its conclusion that the election results should stand" (Pet. App. A30).<sup>2</sup>

#### ARGUMENT

Petitioner agrees (Pet. 8-9) with the Board and the court of appeals that the applicable legal principles for determining whether alleged misrepresentations in a campaign require setting aside an election are those set forth in *Hollywood Ceramics, supra*. The only issue presented by the petition is whether the Board reasonably concluded that the union's leaflets did not contain material misrepresentations, and that, in any event, petitioner had an opportunity for effective reply. Such an issue, which turns on the particular facts of the case, does not warrant further review. Moreover, for the reasons stated in the court of appeals' opinion (Pet. App. A26-A30), the Board's conclusions were reasonable.<sup>3</sup>

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<sup>2</sup> The court denied petitioner's motion for recall of mandate and a stay. Petitioner then filed a motion for a stay with Mr. Justice Stevens, which was denied on August 14, 1979.

<sup>3</sup> Contrary to petitioner's assertion (Pet. 11), the decision below does not conflict with that of any other court of appeals. In each of the cases cited, as in the present case, the court acknowledged that misrepresentations regarding wages can affect election results, but then examined the facts of the case to determine whether misrepresentations had actually been made, whether the employer had an opportunity to respond, and whether any misrepresentation had a probable impact on the election.

Nor, contrary to petitioner's contention (Pet. 11-12), does the decision below depart from a line of cases recognizing

There is no merit to petitioner's contention (Pet. 9-10) that, in light of *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969), the decision below allows unions to make predictions as to post-election benefits, while employers "must stand mute." As the court of appeals noted (Pet. App. A29 n.7), the union's "prediction" here was merely the factual comparison of average earnings for union and non-union workers, using figures quoted from a BLS report; a company statement informing employees of the ambiguity it perceived in the union's presentation of the BLS figures would not have amounted to a prediction of the economic consequences of unionization within the meaning of *Gissel*. Moreover, *Gissel* did not preclude an employer from making "prediction[s] as to the precise effects he believes unionization will have on his company" so long as he does not threaten retaliatory action against employees as part of his economic prediction (*Gissel, supra*, 395 U.S. at 618).

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that employers cannot respond effectively to a union's statements about its own contracts, since the statement challenged here involved the union's constitution. Petitioner had a copy of the constitution and, indeed, had quoted from it in a letter to the employees.

Finally, the question raised by petitioner (Pet. 13) whether the burden of proof should shift to the General Counsel "where the Employer demonstrates that the campaign was tainted by material misrepresentations" is not presented here, since, as the Board and the court below agreed (Pet. App. A9, A10, A26-A27, A29), petitioner had not shown that the election campaign was so tainted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.  
*Solicitor General*

JOHN S. IRVING  
*General Counsel*

JOHN E. HIGGINS, JR.  
*Deputy General Counsel*

ROBERT E. ALLEN  
*Acting Associate General Counsel*

NORTON J. COPE  
*Deputy Associate General Counsel*

LINDA SHER  
*Assistant General Counsel*

CANDACE M. CARROLL  
*Attorney  
National Labor Relations Board*

SEPTEMBER 1979